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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 70-279

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

FLORIDA EAST COAST RAILWAY COMPANY AND SEABOARD COAST LINE RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (J.S. App. 1a–50a) is reported at 322 F. Supp. 725. The "interim report" of the entire Interstate Commerce Commission (J.S. App. 51a–84a) is reported at 337 I.C.C. 183. The final report of the entire Commission (J.S. App. 85a–114a) is reported at 337 I.C.C. 217.

JURISDICTION

The judgment of the district court was entered on February 18, 1971 (J.S. App. 16a). An order modifying the judgment with respect to certain record keep-

ing matters pending appeal was entered on April 14, 1971 (J.S. App. 49a). The United States and the Commission filed notices of appeal on April 15, 1971 (J.S. App. 115a, 117a). The appeal was docketed on June 14, 1971. Probable jurisdiction was noted by the Court on June 12, 1972 (App. 206). The jurisdiction of this Court rests on 28 U.S.C. 1253.

QUESTIONS PRESENTED

1. Whether the rulemaking proceedings here under review are governed by the provisions of Sections 556 and 557 of the Administrative Procedure Act, 5 U.S.C. 556 and 557.

2. If so, whether the appellee railroads were prejudiced by the Interstate Commerce Commission's requirement that all evidence be submitted in written form without the presentation of live testimony or the cross-examination of witnesses and were thus entitled to an oral hearing under Section 556 of the Administrative Procedure Act.

3. Whether the appellee railroads should be ordered to make restitution of the incentive per diem charges they would have paid other railroads but for the order of the court below setting aside the Commission's rules insofar as they apply to the appellee railroads.

STATUTE INVOLVED

Section 1(14)(a) of the Interstate Commerce Act, as amended, 49 U.S.C. 1(14)(a), provides:

> The Commission may, after hearing, on a complaint or upon its own initiative without complaint, establish reasonable rules, regulations, and practices with respect to car service by com-

mon carriers by railroad subject to this part, including the compensation to be paid and other terms of any contract, agreement, or arrangement for the use of any locomotive, car, or other vehicle not owned by the carrier using it (and whether or not owned by another carrier), and the penalties or other sanctions for nonobservance of such rules, regulations, or practices. In fixing such compensation to be paid for the use of any type of freight car, the Commission shall give consideration to the national level of ownership of such type of freight car and to other factors affecting the adequacy of the national freight car supply, and shall, on the basis of such consideration, determine whether compensation should be computed solely on the basis of elements of ownership expense involved in owning and maintaining such type of freight car, including a fair return on value, or whether such compensation should be increased by such incentive element or elements of compensation as in the Commission's judgment will provide just and reasonable compensation to freight car owners, contribute to sound car service practices (including efficient utilization and distribution of cars), and encourage the acquisition and maintenance of a car supply adequate to meet the needs of commerce and the national defense. The Commission shall not make any incentive element applicable to any type of freight car the supply of which the Commission finds to be adequate and may exempt from the compensation to be paid by any group of carriers such incentive element or elements if the Commission finds it to be in the national interest.

Section 553(c) of the Administrative Procedure Act, 5 U.S.C. 533(c), provides:

> After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556(d) of the Administrative Procedure Act, 5 U.S.C. 556(d), provides in cases governed by its provisions for the submission of oral evidence and the cross-examination of witnesses; it then provides:

> In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. App. 16a) setting aside with respect to appellees—the Florida East Coast Railway Company ("FEC") and the Seaboard Coast Line Railroad Company ("Seaboard")—an order issued by the Interstate Commerce Commission

as part of its broad effort to combat the freight car shortage problems facing the nation's shippers. In 1966, Congress amended Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a), to authorize the Commission to consider whether an incentive element should be added to the compensation to be paid by one railroad to another for the use of its freight cars, in order to increase the supply and improve the distribution and utilization of those types of freight cars found to be in short supply. The Commission order here in issue (J.S. App. 114a) prescribed incentive per diem charges to be added during part of each year to the ordinary rentals for standard boxcars. In keeping with the purposes of the 1966 amendment, the prescribed incentive elements were fixed at sufficiently high levels to encourage the owners of equipment to purchase more equipment and the users to return the cars to the owners at a faster pace, thereby increasing both the supply and the utilization of freight cars.

A. PROCEEDINGS BEFORE THE COMMISSION

1. *The discontinued investigation of 1966.*—Following the 1966 amendment, the Commission issued a notice of proposed rulemaking in a proceeding entitled *Incentive Per Diem Charges,* Ex Parte No. 252 (31 Fed. Reg. 9240). After extensive and lengthy proceedings, in which 189 separate railroads participated, including participation by some of them in oral hearings, the Commission concluded that "[a]n overall nationwide review of traffic and service demands and trends must precede any valid determination of the

existing or prospective national requirements for freight cars of particular types" (332 I.C.C. 11, 15). It found that "the investigation produced no reliable information respecting the quantum of interim incentive charge necessary to meet the statutory standards" and further concluded "that the information necessary to this decision is not presently available" (332 I.C.C. at 16). Discontinuing the rulemaking proceedings, the Commission announced its intention to remedy the existing informational deficiency through institution of a nationwide freight car investigation (*id.* at 18).

2. *Freight Car Study of 1968.*—In December 1967, the Commission initiated the present proceeding by requiring all common carriers subject to the Interstate Commerce Act to participate in a study of car demand and supply conditions throughout the country (App. 52–63). The railroads supplied a scientific and systematic sampling of car orders, supply and placement, during the study period, in a total of 32,420 reports that covered 2,641 stations on 135 railroads (J.S. App. 62a). The Commission found, without serious challenge, that the study was statistically sound (J.S. App. p. 89a). The accumulated data were recorded on magnetic tapes and made available to the carriers (J.S. App. 136a).

On May 13, 1969, an initial analysis of the data was presented to the Subcommittee on Surface Transportation of the Senate Committee on Commerce.[1] Mem-

[1] Reprinted in *Freight Car Supply*, Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

bers of the subcommittee—impatient with delays in implementing the legislative mandate to deal with the pressing problem of car shortages—emphatically expressed the opinion that the Commission had sufficient information upon which to act. See generally Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess. A subsequent Commission proposal for further study of additional types of freight cars (App. 64–94) was firmly opposed, as unnecessary, by a number of carriers, including both appellees (App. 23–24, 95–100).

3. *Interim decision.*—Thereafter, on December 12, 1969, the entire Commission issued an interim report, order, and rule, proposing a scale of incentive charges based on a further analysis of the 1968 data (J.S. App. 51a–84a).[2] Based on these data, the Commission found the existing supply of standard boxcars inadequate to satisfy car demands for at least half of each year—from September through February—and proposed an incentive per diem charge, limited to unequipped boxcars in general service, that would provide, on a yearly basis, a return on investment comparable to that which could be expected by investments in nonregulated corporations (J.S. App. 53a–58a). It was anticipated that the proposed incentive would have the dual benefit of improving car utilization of the type in short supply during the period of greatest need, and providing a fund with which to augment the deficient national boxcar fleet (J. S. App. 54a).

[2] The order and rule were published at 34 Fed. Reg. 20438.

The interim report stated that the proposed charges were tentative, experimental and open to comment and criticism (J.S. App. 55a). All interested parties were invited to submit verified statements of fact and briefs respecting the tentative conclusions of the report. The Commission did not schedule oral hearings, but directed that those desiring an oral hearing "set forth with specificity the need therefor and the evidence to be adduced" (J.S. App. 81a).

Numerous railroads, shippers, governmental agencies, and organizations of shippers responded to the interim order and favored, opposed, or sought some modification of the decision. Among those seeking an oral hearing were the Long Island Railroad Company and appellees Seaboard and FEC. The Long Island requested "testimony by the Commission's staff which would serve to introduce into evidence the studies relied upon in the Interim Report," and that it be given an opportunity "to cross-examine witnesses in relation thereto and to rebut same" (App. 203, and see App. 103).

Seaboard's 12-page statement primarily requested that the charges for its specially equipped boxcars be increased. It complained that there had been no "hearing" and urged that the interim order be "set aside until a proper record can be made" (J.S. App. 20a, 27a). It neither proffered data for the use of the Commission nor described any evidence that it wished to adduce at an oral hearing.

FEC filed a brief, and written evidence in the form of verified statements made by two of its officers. In a 2½-page request for an oral hearing (J.S. App. 46a–48a), it stated that it desired to cross-examine

"those employees of the Commission who supervised and directed the study summarized in the appendices to the interim report and those Commission employees familiar with railroad car service matters who testified in the prior proceedings in Ex parte No. 252." It stated that it expected to establish through such cross-examination that (J.S. App. 47a–48a):

> (*a*) Deficiencies reported in the study conducted by the Commission may not be affected by the supply of cars available at a reporting station, on a reporting railroad, or in a statistical region;
>
> (*b*) Railroad ownership of additional plain [standard] box cars would not necessarily change the results summarized in the appendices to the interim report;
>
> (*c*) No computation has been or can be made on the evidence before the Commission in this proceeding of the number of additional boxcars that would be needed to furnish on the day ordered all plain box cars at all stations during the period September 1 through February 28 of each year;
>
> (*d*) It is unreasonable to expect rail carriers to supply for loading within 24 hours a plain boxcar in all instances.

4. *Final Commission decision.*—On April 28, 1970, the Commission entered its final report, order and rules (J.S. App. 85a–114a). With modifications not here relevant, it adopted the conclusions of the interim report and set forth additional detailed findings in response to the submissions of the parties. The Commission found that no party had been prejudiced by the submission of evidence in written form and that

therefore, under Section 556 of the Administrative Procedure Act, the hearing requirement of Section 1(14)(a) of the Interstate Commerce Act had been complied with (J.S. App. 87a). It reiterated that this was an "open-ended" proceeding in which the parties were expected to bring to its attention "any evidence of circumstances requiring modification of the rules * * * as experience is gained under the new regulations" (J.S. App. 87a–88a). The requests for oral hearing were denied "in the absence of any specific showing of prejudice, and in the interest of taking timely and needed action in this area of serious regulatory concern" (J.S. App. 88a). The Commission stated, however, that the requests could be renewed "as experience is obtained with the incentive charges" (*ibid.*).

The Commission denied exemptions to any groups of railroads, but emphasized again that, "following a period of actual experience under our order, if incentive per diem imposes an undue burden on any railroad, or otherwise requires revision, we will entertain, and indeed expect, specific proposals from the parties to this proceeding" (J.S. App. 103a).

B. THE DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

The Long Island Railroad Company attacked the Commission's denial of an oral hearing in an action filed in the United States District Court for the Eastern District of New York. *Long Island R. Co.* v. *United States,* 318 F. Supp. 490 (J.S. App. 119a-138a). The three-judge district court, in an opinion

by Circuit Judge Friendly, sustained the Commission's decision. The court first held that Section 556 of the Administrative Procedure Act, relating to the conduct of hearings, governed the Commission's proceedings in this case. In reaching this result, the court noted that under Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, Section 556 applies in cases where rules "are required by the statute to be made on the record after opportunity for agency hearing," and concluded that Section 1(14)(a) meant both a hearing and a decision "on the record" (J.S. App. 127a–133a).

Applying Section 556(d) of the Administrative Procedure Act, however, the court held that the Commission could properly rely upon evidence submitted in written form without an oral hearing, unless a party would thereby be "prejudiced" (J.S. App. 134a–137a). Long Island's request for an oral hearing failed to notify the Commission of possible prejudice because it did not specify the need for cross-examination or presentation of live rebuttal testimony (J.S. App. 136a–137a).

Considering specific representations of prejudice made to it but not to the Commission, the court concluded that it was not shown "how cross-examination with respect to the statistics or the presentation of oral rather than written testimony would have aided *materially* in their resolution" (J.S. App. 143a, emphasis supplied). The court emphasized that "the decision here called for a leap of judgment by the Commission which detailed figures would inform but

could not determine" (*ibid.*), and that Long Island had not been denied a fair opportunity to present its case (J.S. App. 138a).

C. THE DECISION BELOW

Seaboard and FEC attacked the Commission's decision in separate suits filed in the United States District Court for the Middle District of Florida. The three-judge court which heard the two suits together entered an initial temporary restraining order enjoining the enforcement of the Commission's incentive per diem order against the two railroads (App. 48–49). On the government's motion, the court modified the temporary restraining order to require the railroads to keep records so that, in the event the Commission were upheld, they would be in a position to make restitution of the incentive payments they would have made to other railroads but for the temporary restraining order (App. 50–51).

After full consideration of the cases, the court set aside the Commission's per diem order with respect to Seaboard and FEC and remanded the cases to the Commission solely on the ground that the two railroads had not been given an oral hearing as required by Section 1(14)(a) of the Interstate Commerce Act and Section 556(d) of the Administrative Procedure Act (J.S. App. 1a–16a). In ruling that it was not enough that the two railroads had been given an opportunity to present their own analyses of the 1968 data or any other pertinent evidence they desired in written form, the court distinguished the *Long Island* case on factual grounds (J.S. App. 7a–8a); the court

concluded, without substantial analysis, that "assertions" made by Seaboard and FEC to the Commission "demonstrate the prejudice" of denying them an oral hearing (J.S. App. 8a).

The district court found the Commission's argument that the evidence to be adduced must be capable of materially affecting its decision "wide of the mark" (*ibid.*); it held that the Commission must give "strict adherence to cherished procedural rights" in the form of oral hearings (*ibid.*) The court found its conclusion "fortified" by statements of the Commission's former General Counsel before the Senate subcommittee that "hearings" were necessary in order to impose incentive per diem charges (J.S. App. 16a).

SUMMARY OF ARGUMENT

The court below erred on two grounds in holding that the Commission was required to afford FEC and Seaboard an opportunity to present live testimony and cross-examine witnesses prior to promulgating incentive per diem rules governing general service boxcars. First, the court erred in applying Section 556 of the Administrative Procedure Act to the rulemaking proceeding here under review. Second, even if Section 556 was applicable, the court erred in finding that the appellees were "prejudiced" within the meaning of that Section by the absence of oral hearings.

Section 553 of the Administrative Procedure Act specifies the minimum procedures federal agencies must follow in rulemaking proceedings. It requires agencies to give persons an opportunity to submit data and written argument in connection with a rulemaking

proceeding, but does not require the holding of oral hearings. Under Section 553(c), however, Section 556 of the Act is made applicable "[w]hen rules are required by statute to be made on the record after opportunity for an agency hearing." Section 556(d) generally requires full adjudicatory-type hearings, except that agencies may require all evidence to be submitted in written form where a party will not be prejudiced thereby.

While Section 1(14)(a) of the Interstate Commerce Act requires a "hearing" prior to the adoption of rules relating to freight car service, it does not explicitly require that rules be based "on the record." While in appropriate instances a requirement that rules be based "on the record" may be implied by the statutory language and context or the type of rulemaking involved, there is no such implication here. Far from suggesting a need for full adjudicatory hearings, the promulgation of car service rules applicable to all railroads can best be accomplished through the types of procedures adopted by the Commission in this case. In a decision which is controlling here, this Court recently held that Section 1(14)(a) does not require that rules be based "on the record" and that Section 556 of the Administrative Procedure Act is inapplicable to proceedings under the Section. *United States* v. *Allegheny-Ludlum Steel Corp.*, No. 71-227, decided June 7, 1972, slip op. at 14–16. Thus, the rulemaking proceeding here under review was governed by Section 553(c) and no oral hearing was required.

Even if Section 556 were applicable here, however, the decision below should still be reversed since neither

FEC nor Seaboard established before the Commission that they would be "prejudiced" by the absence of oral hearings. As the three-judge court in the *Long Island* case, *supra,* properly held, to establish "prejudice" entitling it to a hearing under Section 556(d), a party must specify its need to present live testimony and cross-examine witnesses and show how such live testimony or cross-examination would "materially" aid the Commission in resolving the issues before it (J.S. App. 136a–137a).

The court below merely accepted without substantial analysis FEC's and Seaboard's assertions of prejudice as showing a need for a hearing. Seaboard, however, raised no matters which could not be asserted through written submissions to the Commission. FEC, while claiming a need to cross-examine Commission employees who had participated in various freight car studies, a procedure in itself improper, did not show that the matters it sought to establish through such cross-examination would have "materially" aided the Commission in reaching a decision on the proposed incentive per diem rules. Adoption of the rules in this proceeding depended principally on the Commission's exercise of judgment, and not on the resolution of any substantial factual dispute. By requiring the Commission to hold an oral hearing in this case, the court below significantly weakened the "prejudice" requirement of Section 556(d), removing much of the procedural flexibility Congress found appropriate for rulemaking proceedings.

Finally, if this Court upholds the Commission's rules, FEC and Seaboard should be ordered under

the principles of *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145, 146, to make restitution of the incentive per diem charges they would have incurred but for the temporary restraining order and injunction entered by the court below barring enforcement of the Commission's rules against them.

ARGUMENT

I

THE COMMISSION WAS NOT REQUIRED TO PERMIT ORAL PRESENTATIONS OF EVIDENCE OR CROSS-EXAMINATION IN THIS RULEMAKING PROCEEDING SINCE SECTION 556 OF THE ADMINISTRATIVE PROCEDURE ACT IS INAPPLICABLE

In rulemaking proceedings, the Commission and other federal regulatory agencies are required by Section 553 of the Administrative Procedure Act, 5 U.S.C. 553, to give interested persons notice (Section 553(b)) and an opportunity to participate in the rulemaking "through the submission of written data, views, or arguments with or without opportunity for oral presentation" (Section 553(c)). As a general matter, Congress did not impose on the rulemaking process the formal requirements of oral hearings and cross-examination that characterize adjudicatory proceedings.

Congress recognized, however, that some regulatory statutes specifically require a judicial-type hearing, even when the agency is engaged in rulemaking. It therefore preserved the requirements of those statutes by adding at the end of Section 553(c):

> * * * When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

Section 556 prescribes the procedures for the hearings to which the Section applies and Section 557 prescribes the procedures for rendering decisions subsequent to such hearings.[3]

The legislative history of Section 553, summarized in the Attorney General's Manual on the Administrative Procedure Act,[4] pp. 34–35, discloses that Congress deliberately refrained from making Sections 556 and 557 applicable to rulemaking proceedings in every case where a regulatory statute requires a "hearing," but instead made those provisions applicable only where both a hearing and a decision "on the record" are required by the relevant statute. As the Attorney General's Manual points out (pp. 32–33), few federal statutes that require a hearing in rulemaking state

[3] Of relevance here is the provision in Section 556(d) entitling a party to present "oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full or true disclosure of the facts." These rights, however, are qualified by the last sentence of Section 556(d), which provides that: "In rule making * * * an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form." In point II, *infra*, we show that even if Section 556 applies to the rulemaking proceeding here under review, neither FEC nor Seaboard was prejudiced by the absence of oral hearings.

[4] The Attorney General's Manual, which contains a section-by-section analysis of the Administrative Procedure Act, was compiled after the Act became law to guide federal agencies in adjusting their procedures to the requirements of the Act. See Manual, p. 6.

explicitly that the agency decision following the hearing must be "on the record."[5] In the absence of an explicit statement, however, a requirement that a decision be based "on the record" might be inferred from other provisions of the statute or from the type of rulemaking involved (*ibid.*). Section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), prescribing the Commission's ratemaking authority, for example, does not explicitly require Commission rate decisions to be "on the record." The context of the Section, however, which authorizes the Commission "to enter upon a hearing concerning the lawfulness" of rates, and its requirement that a "full hearing" be completed before the Commission makes its final order, strongly suggest that the Commission's ultimate decision must be "on the record." Indeed, this Court has held that a requirement of a "full hearing" in a ratemaking statute (Section 310 of the Packers and Stockyards Act of 1921, 7 U.S.C. 211) refers to a quasi-judicial proceeding in which the decision is based on the evidence introduced at the hearing. *Morgan* v. *United States,* 298 U.S. 468, 480.

There are other statutes, however, in which neither the statutory language and context nor the type of rulemaking involved suggests that a "hearing" requirement also includes a requirement that a decision be based "on the record." Section 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. 1(14)(a)—

[5] The Manual (pp. 32–33) cites Section 701 of the Federal Food, Drug, and Cosmetic Act, 52 Stat. 1055, which then required the Administrator in issuing certain rules to "base his order only on substantial evidence of record at the hearing."

the provision under which the rules here in issue were promulgated—is in this category. Section 1(14)(a) simply states that the Commission "may, after hearing, * * *" establish rules fixing compensation for the use of freight cars. No reference is made to a decision "on the record" or even to a "full hearing." Nor does the subject matter involved—the promulgation of reasonable car service rules—suggest a requirement that an order adopting rules be based "on the record." As Judge Friendly explained in the *Long Island* case, *supra,* the decision here to add specific per diem incentives to freight car rentals "called for a leap of judgment by the Commission which detailed figures would inform but could not determine" (J.S. App. 137a). It is precisely in such a situation that rulemaking flexibility is desirable. Since a requirement that rules under Section 1(14)(a) be based "on the record" is not implied by the statutory language or context or by the nature of the rulemaking involved, it follows that Sections 556 and 557 of the Administrative Procedure Act are not applicable to the rulemaking proceedings here under review.

Consistently with the foregoing analysis, this Court has squarely held that rules adopted under Section 1(14)(a) of the Interstate Commerce Act are not required to be based "on the record." *United States* v. *Allegheny-Ludlum Steep Corp.,* No. 71-227, decided June 7, 1972, slip op. at 14–16. In that case, the Court upheld certain car service rules promulgated after a hearing by the Commission. The Court specifically rejected the contention that the Commission's order

failed to comply with the provisions of Sections 556 and 557 of the Administrative Procedure Act on the ground that those Sections were inapplicable. The Court noted that, under Section 553(c), Sections 556 and 557 apply only where a regulatory statute, in addition to providing for a hearing, requires that the agency decision be "on the record" (slip op. at 15-16). In a passage which is controlling here, the Court then stated (slip op. at 16):

> We do not suggest that only the precise words "on the record" in the applicable statute will suffice to make §§ 556 and 557 applicable to rulemaking proceedings, but we do hold that the language of the Esch Car Service Rules Act [Section 1(14)(a) of the Interstate Commerce Act] is insufficient to invoke these sections.

In his opinion in the *Long Island* case, *supra*, Judge Friendly notes (J.S. App. 133a) that the Commission in the past has conducted full hearings, during which the parties were permitted to present oral testimony and cross-examine witnesses, prior to the promulgation of rules under Section 1(14)(a). The fact that prior to the proceeding here under review the Commission had not taken full advantage of the flexible procedures permitted by Section 553(c) of the Administrative Procedure Act, however, is of limited significance.[6] The legislative history of Section

[6] The court below quoted extensively (J.S. App. 9a–15a) the testimony before Congress of a former General Counsel of the Commission to the effect that the Commission must hold a "hearing" prior to the adoption of incentive per diem rules under Section 1(14)(a). The witness, however—who distinguished Section 1(14)(a) from Section 1(15) of the Act under

553(c) discloses that the Section was intended to set minimum standards for rulemaking proceedings. The Senate committee report on the Administrative Procedure Act makes clear that in matters of great import, agencies should adopt more elaborate procedures appropriate to the particular proceedings. S. Rep. No. 752, 79th Cong., 1st Sess., reprinted in Administrative Procedure Act, Legislative History (published by the Senate Judiciary Committee), pp. 200–201. The report states that where sharply contested issues of fact are presented in rulemaking proceedings, agencies should not as a matter of good practice take advantage of the exemption from the requirements of Sections 556 and 557 contained in Section 553(c) (*id.* at 216). That the Commission in the past has conducted judicial-type hearings in rulemaking proceedings under Section 1(14)(a) is consistent with these admonitions.

In the proceedings under review, however, it was a proper exercise of the discretion Congress conferred on it for the Commission to conclude that the public interest would be better served by a more limited procedure, in light of the on-going nature of the proceeding, the severe shortage of freight cars, the fact that all rail carriers in the nation would be affected (and oral hearings

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which the Commission may issue certain emergency car service orders without notice or hearing of any kind—did not address himself to the type of hearing required by Section 1(14)(a). His testimony is thus of little relevance here. In any event, opinions expressed by Commission members or staff before congressional committees are not binding on the Commission. See *Minneapolis R.R. Co.* v. *Peoria Ry.* 270 U.S. 580, 585; *Thompson* v. *Texas Mexican R. Co.*, 328 U.S. 134, 146.

might therefore be cumbersome and unduly repetitious), and the extreme displeasure voiced by Congress in 1969 with the Commission's failure speedily to adopt the incentive per diem rules authorized by Congress in its 1966 amendment to Section 1(14)(a).[7]

If Sections 556 and 557 of the Administrative Procedure Act are not applicable to the proceedings here under review, the proceedings are governed by Section 553 alone, and the Commission was under no obligation to allow the presentation of oral testimony and cross-examination. As this Court held in *Allegheny-Ludlum, supra,* proceedings under Section 1(14)(a) of the Interstate Commerce Act are governed by Section 553 of the Administrative Procedure Act, and all that is required by Section 553 is "basically that notice of proposed rulemaking shall be published in the Federal Register, that after notice the agency give interested persons an opportunity to participate in the rulemaking through appropriate submissions, and that after consideration of the record so made the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose" (slip op. at 16). The Court specifically noted that Section 1(14)(a) "likewise requires" a hearing (slip op. at 16, n. 5). The inference is clear that the hearing requirement would be fully satisfied by the Commission's compliance—which is undisputed here—with the pro-

[7] Judge Friendly in the *Long Island* case, *supra*, describes (J.S. App. 125a) in general the reaction of Congress to the delays consumed by the Commission's investigations into the need for incentive per diem charges. See Hearings before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, 91st Cong., 1st Sess.

cedures specified in Section 553(c) of the Administrative Procedure Act. See, also, *Siegel* v. *Atomic Energy Commission,* 400 F. 2d 778, 785–786 (C.A. D.C.).

II

EVEN IF SECTION 556 OF THE ADMINISTRATIVE PROCEDURE ACT IS APPLICABLE, THAT SECTION WAS COMPLIED WITH SINCE APPELLEES WERE NOT PREJUDICED BY THE SUBMISSION OF ALL EVIDENCE IN WRITTEN FORM

If the Court agrees with our submission that *Allegheny-Ludlum* is controlling here and that Section 556 of the Administrative Procedure Act is inapplicable, it would follow that the judgment below should be reversed. If Section 556 were deemed applicable, however, it would then be necessary to consider whether the Commission complied with its requirements. This is the question to which we now turn.

As we have noted, Section 556(d) entitles a party in a Commission proceeding to present oral evidence and conduct cross-examination subject to the qualification that in rulemaking and certain other proceedings the Commission may provide for the submission of all evidence in written form "when a party will not be prejudiced thereby." The issue here is whether either FEC or Seaboard established before the Commission that it would be "prejudiced" by the absence of an opportunity to present oral evidence and cross-examine witnesses. As the three-judge court in the *Long Island* case, *supra,* concluded, to establish "prejudice" entitling it to an oral hearing under Section 556(d), a party must identify with specificity the matters with respect to which it needs to present live

testimony or cross-examine witnesses and show how such live presentation (as opposed to submission in written form) or cross-examination would enable the party to present its case with respect to the Commission's rule proposals and would "materially" aid the Commission in resolving the issues before it (J.S. App. 136a–137a). Neither Seaboard nor FEC has met this burden.

In concluding that Seaboard had been "prejudiced" by the Commission's procedures in this case, the court below merely listed the railroad's contentions. The court noted, for example, that Seaboard had pointed out to the Commission that it had recently purchased a large number of specially equipped boxcars and had argued that the limitation of the proposed incentive rates to general boxcars would penalize Seaboard for investing in special equipment. Seaboard had also questioned the foundation of the Commission's rules, had objected to the requirement that incentive payments be placed in a fund earmarked for new equipment purchases and had alleged that the Commission's order would cost Seaboard about $1.8 million annually (J.S. App. 7a–8a, 19a–27a). While these contentions may indicate that the adoption of the rules was not in Seaboard's best interest, they do not establish that the denial of an oral hearing prevented Seaboard from making the contentions and presenting supporting data. Seaboard did not allege, for example, that its submissions or the submissions of others raised sharply contested issues of fact that required an oral hearing for proper resolution.

FEC, as the court below noted (J.S. App. 8a), presented certain policy reasons why it should be exempted from the incentive per diem charges (J.S. App. 34a–41a).[8] Its short request for an oral hearing (J.S. App. 46a–48a) asserted that it needed an opportunity to test the factual bases of the reports compiled by the Commission staff from data submitted by the railroads and summarized by the Commission in appendices to its interim report (see J.S. App. 62a–80a). FEC stated that it expected to establish by cross-examination of Commission employees participating in the study (1) that the failures to fill shippers' requests for freight cars reported in the study "may" not have been affected by the supply of cars at particular locations, (2) that increased freight car ownership "would not necessarily" change the results summarized in the appendices to the interim study, (3) that no computation has been made of the number of freight cars needed to eliminate "all" delays in providing cars to shippers and (4) that it is unreasonable to expect railroads to supply cars for loading within 24 hours in "all" instances (J.S. App. 47a–48a).

To begin with, even if an oral hearing were held, FEC would not be entitled to cross-examine Commission staff on the compilation of the reports. The basic data underlying the reports were available to the railroads who could have compiled their own reports. The Commission staff in this instance did not produce testimony in any sense, but was merely assisting the Com-

[8] FEC also submitted written evidence in the form of verified statements by two of its officers (App. 106–149).

mission in analyzing these data as part of the decisional process. This Court has held that a litigant is not entitled "to probe the mental processes" of the decisionmaker itself. *Morgan* v. *United States*, 304 U.S. 1, 18; *United States* v. *Morgan*, 313 U.S. 409, 422. Here, while FEC was not attempting to cross-examine individual Commissioners, it was seeking to cross-examine those who had aided the Commissioners in reaching their decision. Such cross-examination would disrupt the internal working of the agency and the integrity of the administrative process. See *Walled Lake Door Co.* v. *United States*, 31 F.R.D. 258 (E. D. Mich.).

In any event, cross-examination of the Commission staff on the above matters, even if it might have established one or more of FEC's contentions, would not have materially aided the Commission in resolving the issues before it. FEC merely sought to prove that the Commission had not acted with absolute certainty and had not proposed a rule that by itself would end the freight car shortage. FEC's contentions were phrased in such a way that the Commission could readily have agreed with each "fact" sought to be established by FEC without changing any of its conclusions with respect to the need for incentive per diem charges. In these circumstances, the holding of extensive oral hearings would have been a wasted effort * and would only have delayed further the adoption of the rules long under study. Indeed, the Commission had already held

* Cf. *Denver Stock Yard* v. *Livestock Assn.*, 356 U.S. 282, 287; *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205.

extensive oral hearings in the abortive investigation of 1966 and 1967 (see *Incentive Per Diem Charges*, 332 I.C.C. 11, 12), during which the railroads had in the main merely stated their positions without attempting to create a record upon which the Commission could act. Moreover, in the final stages of decision, the basic issues were matters of policy and judgment rather than of disputed fact. As Judge Friendly aptly stated in the *Long Island* case, the Commission was called upon to perform a "leap of judgment" to determine whether "some form of incentive compensation" would promote the objectives of the 1966 amendment to the Act and "if so, what the form should be" (J.S. App. 137a–138a).

In short, Seaboard and FEC have fallen short of establishing the "prejudice" that, under Section 556(d) of the Administrative Procedure Act, would preclude the Commission from receiving all evidence in written form. In adopting Section 556(d), Congress refrained from establishing an absolute right to cross-examination in rulemaking proceedings. By requiring the Commission to hold an oral hearing on the basis of the assertions made by Seaboard and FEC here—assertions of a type that could be made in virtually all rulemaking proceedings—the court below in practical effect eliminated the "prejudice" requirement of Section 556(d) and opened up new and unwarranted avenues of delay in rulemaking proceedings.

III

THIS COURT SHOULD DIRECT THE COURT BELOW TO ORDER FEC AND SEABOARD TO MAKE FULL RESTITUTION OF THE INCENTIVE PER DIEM CHARGES THEY WOULD HAVE PAID BUT FOR THE ORDERS OF THE COURT BELOW

The incentive per diem rules adopted by the Commission became effective for all railroads throughout the country, other than FEC and Seaboard, on September 1, 1970. FEC and Seaboard were exempted from the rules by a temporary restraining order entered by the court below on August 28, 1970 (App. 48–49). Both FEC and Seaboard use disproportionately large numbers of general service boxcars belonging to other railroads, and they acknowledged before the Commission that they would thus owe substantial sums to connecting railroads under the incentive plan.[10] Consequently, the government requested the district court to amend its temporary restraining order to provide the means for FEC and Seaboard to make restitution to those connecting railroads should the Commission's order be sustained.

On August 31, 1970, the district court entered a further order requiring FEC and Seaboard to keep records in accordance with the newly established accounting rules of the Commission[11] so that they

[10] Seaboard stated that it would "lose in excess of $1.5 million each year" as a result of the incentive per diem rules (J.S. App. 24a), without specifying how much of this was payable to others. FEC stated that it would owe an average of about $27,000 for each month the higher charges were in effect (J.S. App. 40a).

[11] On May 28, 1970, the Commission's Bureau of Accounts established uniform record-keeping requirements for all railroads subject to the incentive per diem rules (App. 205).

would be in a position to pay accrued incentive charges to other railroads and receive incentive payments for the rentals of their own cars "if so ordered by the final decision of this Court" (App. 50–51).[12] Finally, after refusing to enforce the Commission's rules against appellees, the three-judge court modified its final judgment at the government's request to require FEC and Seaboard "to continue to maintain the accounting records described in the August 31, 1970, order of this court" (J.S. App. 49a). The district court thus recognized that if the Commission's rules are ultimately upheld by this Court, FEC and Seaboard may be required to make restitution of the incentive per diem charges they would have incurred but for the temporary restraining order and injunction.

This Court has long recognized that "[i]t is one of the equitable powers, inherent in every court of justice so long as it retains control of the subject-matter and of the parties, to [control] that which has been wrongfully done by virtue of its process." *Arkadelphia Co.* v. *St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145–146. In *Arkadelphia,* a carrier obtained a judicial order enjoining, pending a final court determination on the merits, lower freight rates set by a state agency. While the restraining order was in effect, the carrier charged shippers rates higher than those set by the rate order. Subsequently, the courts dismissed without prejudice for failure of proof the attack on the rate

[12] The court also made clear that its stay prevented FEC and Seaboard from collecting incentive charges owed to them (App. 50).

order and dissolved the injunction. Shippers who had paid the higher rates while the court's injunction was in effect sought a refund of the excess monies paid during the period. Finding restitution appropriate in the circumstances, this Court observed that when the carriers failed to sustain the validity of their rates, "they at the same time showed that the injunctions ought not to have been allowed." 249 U.S. at 144. The shippers were entitled to a refund under the principle "long established and of general application, that a party against whom an erroneous judgment or decree has been carried into effect is entitled, in the event of a reversal, to be restored by his adversary to that which he lost thereby." 249 U.S. at 145. See also *Baltimore & Ohio Railroad Co.* v. *United States,* 279 U.S. 781, 786; *Middlewest Motor Freight Bureau* v. *United States,* 433 F. 2d 212, 225–229 (C.A. 8), certiorari denied, 402 U.S. 999.

The *Arkadelphia* principle is directly applicable here. All railroads in the country other than FEC and Seaboard have been incurring incentive per diem charges since September 1, 1970. Appellees alone obtained a stay in the hope that the Commission's rules would not be enforced against them. If, as we urge, this Court upholds the Commission's rules, equity would require that FEC and Seaboard be placed in the position they would have been in but for the stay and injunction.

CONCLUSION

For the reasons stated, the judgment of the district court should be reversed and restitution should be required of FEC and Seaboard.

Respectfully submitted.

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August 1972.

U.S. GOVERNMENT PRINTING OFFICE: 1972